IN THE

Supreme Court of the United States

October Term, 1970

No. 121

RICHARD O. J. MAYBERRY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT

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Authorities Cited.

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Opinions Below

The majority opinion of the Pennsylvania Supreme Court, written by Mr. Justice Jones, is reported at 434 Pa. 478, 255 A. 2d 131 (1969). A Concurring Opinion by Mr. Justice Roberts and A Concurring And Dissenting Opinion by Mr. Justice O'Brien are set forth in the same Reporters. All three Opinions are reproduced in the Appendix. No written Opinion was filed by the trial court.

Jurisdiction

The jurisdiction of your Honorable court is properly invoked under 28 U. S. C. § 1257(3).

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pennsylvania Contempt Statutes. Act of June 16, 1836, P. L. 784, § 23:

"The power of the several courts of this Commonwealth to issue attachments and to inflict summary punishments for contempts of court shall be restricted to the following cases, to-wit;

I. To the official misconduct of the officers of such courts respectively;

II. To disobedience or neglect by officers, parties, jurors, or witnesses of or to the lawful process of the court;

III. To the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice."

Act of June 16, 1836, P. L. 784, § 24:

"The punishment of imprisonment for contempt as aforesaid shall extend only to such contempts as shall be committed in open court, and all other contempts shall be punished by fine only."

Act of June 23, 1931, P. L. 925, § 1:

"In all cases where a person shall be charged with indirect criminal contempt for violation of a restraining order or injunction issued by a court or judge or judges thereof, the accused shall enjoy—

(a) the rights as to admission to bail that are accorded to persons accused of crime;

(b) the right to be notified of the accusation and a reasonable time to make a defense, provided the alleged contempt is not committed in the immediate view or presence of the court;

(c) upon demand, the right to a speedy and public trial by an impartial jury of the judicial district wherein the contempt shall have been committed, provided that this requirement shall not be construed to apply to contempts committed in the presence of the

court or so near thereto as to interfere directly with the administration of justice, or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court; and

(d) the right to file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge, and if the attack occurred otherwise than in open court. Upon the filing of any such demand, the judge shall thereupon proceed no further but another judge shall be designated by the presiding judge of said court. The demand shall be filed prior to the hearing in the contempt proceeding."

Questions Presented

I. Whether a judge may have summarily sentenced a contemnor for criminal contempt committed in his presence without affording the contemnor a jury trial, the right to speak in mitigation of sentence, or specially-appointed counsel?

II. Whether due process requires the trial judge to disqualify himself where the contempt was committed in his presence or whether the peculiar facts herein warrant such action?

III. Whether the Pennsylvania Criminal Contempt Statute, as applied to petitioner, is unconstitutionally vague?

IV. Whether Petitioner's sentence of one-to-two years for each contempt constitutes cruel and unusual punishment?

Counter-Statement of the Case

A. The Circumstances of the Criminal Conviction.

Petitioner and two co-defendants, Herbert Fred Langnes and Dominic Codispoti, were indicted at No. 4672 of 1965 in the Criminal Courts of Allegheny County, Pennsylvania. The indictment contained the counts of: 1) Holding Hostages in a Penal Institution, and 2) Prison Breach. Petitioner entered a plea of not guilty and waived his right to representation by counsel, choosing to act as his own counsel at trial. The court appointed Samuel H. Sarraf, Esq., of the Public Defender's Office, to act as petitioner's consultant throughout the trial. A trial commenced on November 10, 1966 before Judge Fiok and a jury. On December 9, 1966, the jury returned a verdict of guilty as to both counts of the indictment as to petitioner and both co-defendants.

On December 12, Judge Fiok sentenced petitioner to serve a term of imprisonment of not less than fifteen or more than thirty years as to the first count of the indictment (Holding Hostages); on the second count (Prison Breach), a sentence of not less than five or more than ten years was imposed. These sentences were to be served consecutively and were to take effect at the expiration of any sentence appellant was serving at the time they were imposed.

On December 12, 1966, Judge Fiok also sentenced petitioner for eleven separate acts of criminal contempt. A sentence of not less than one or more than two years by separate and solitary confinement at labor was imposed for each contempt. These sentences are to be served consecu-

tively upon the expiration of the sentences imposed at No. 4672 of 1965.[1]

B. The State Court Appeal.

On February 1, 1967, petitioner filed eleven separate appeals from the eleven contempt citations in the Supreme Court of Pennsylvania. The Supreme Court twice continued these appeals on August 7, 1967 and on October 23, 1967, on motion of the petitioner.

On March 5, 1968, petitioner's petition to again continue the argument of these appeals was denied. Thereafter, on March 19, 1968, a judgment of non-pros was entered because of petitioner's failure to file a brief. Subsequently, petitioner filed a Petition to Remove Judgment of Non Pros and to Reinstate the Appeals which petition was granted on August 5, 1968. Peter Kanjorski, Esq. was appointed to represent petitioner in these appeals on August 13, 1968.

Petitioner filed a *pro se* brief which was supplemented by a brief submitted by appointed counsel. Mayberry contended: (1) that he was denied the right to trial by jury on the contempt charges in violation of the Sixth and Fourteenth Amendments to the United States Constitution; (2) that he was denied due process of law by being convicted and sentenced for criminal contempt without procedural safeguards; and (3) that he has been subjected to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution in being sentenced to a minimum of eleven and a maximum

[1] When the petitioner was originally sentenced in open court, the sentences for contempt were to take effect at the expiration of the sentences petitioner was then serving. Subsequently, the sentences were changed so that they would become effective at the expiration of the sentences imposed at No. 4672 of 1965. Order of Judge Fiok dated December 12, 1966.

of twenty-two years on the contempt charges. Appointed counsel raised additionally: (1) that the court erred in failing to provide Mayberry with substantive constitutional safeguards by not apprising him of the nature and elements of the crime of criminal contempt, by not giving timely notice of the commission of criminal contempt, by not informing him of his right to counsel and in failing to provide him with counsel at the time of sentence; and (2) that the statute providing for criminal contempt is unconstitutional as applied to the instant factual situation.

After oral argument on November 12, 1968 the Supreme Court affirmed the sentence of the trial court by Opinion dated April 23, 1969.

Petitioner's *pro se* petition for writ of certiorari to your Honorable court was granted on April 8, 1970.

Summary of Argument

The lower court correctly held that, under the State of Pennsylvania law in 1966 when petitioner was sentenced for direct criminal contempt committed in the presence of the court, petitioner was sentenced in accordance with the due process of the law.

I.

Petitioner was not entitled to a jury trial on the contempt charge since *Bloom v. Illinois*, 391 U. S. 194 (1968) granting contemnors the right to a jury trial is not retroactive. Even though *Baldwin v. New York*, (decided June 22, 1970) grants the right to jury trial in all offenses where a one-year prison sentence may be imposed, the Commonwealth urges that *Baldwin* should be prospective and not be applicable here.

Consequently, petitioner's sentence must be judged in accordance with 1966 standards. Since his contempts were committed in the presence of the court, he was correctly sentenced under the court's plenary power. He was not entitled to present a defense or call witnesses in his behalf. He was not entitled to notice that the court considered his actions contumacious although here the court specifically warned petitioner on several occasions. In addition, petitioner's conduct was so outrageous that, with his previous experience in contempt proceedings, he must have known that his actions were contumacious.

Petitioner waived any right to speak in his defense as a result of the constant verbal abuse inflicted during the trial. He lost his right, through his conduct, to have appointed counsel speak for him. Although he specifically rejected any assistance from court-appointed counsel, counsel was present to render any assistance requested. Petitioner did not petition the court to modify the sentence but chose instead to file a direct appeal to the Pennsylvania Supreme Court.

II.

The sentencing court imposed punishment through its plenary powers to punish summarily in protecting its judicial dignity and decorum. While a great many of petitioner's verbal abuses appeared to be directed at the trial court personally, the thrust of petitioner's contumacious actions were toward preventing the administration of justice and the orderly procedure of the trial. In addition, petitioner never petitioned for disqualification of the sentencing judge.

III.

The Pennsylvania contempt statute, which provides for punishment where contumacious actions obstruct the ad-

ministration of justice, is not unconstitutionally vague as applied here since petitioner's actions attempted to create chaos and disturbance in the courtroom, and caused innumerable delays. It is only through the patience and perseverence of the trial court that petitioner was unsuccessful in his attempt to prevent his trial.

IV.

Petitioner committed eleven separate acts of contempt and was correctly sentenced for each contempt. His actions were not only in the nature of personal abuse to the trial court but were directed to disruption of the orderly and proper administration of justice. Imprisonment has historically been the punishment for direct criminal contempt. Petitioner was properly sentenced.

ARGUMENT

I. In 1966, a judge may have summarily sentenced a contemnor for criminal contempt committed in his presence without affording the contemnor a jury trial, the right to speak in mitigation of sentence, or specially-appointed counsel.

A. Petitioner was not entitled to a non-summary court trial.

Petitioner was sentenced for eleven separate crimes constituting direct criminal contempt in full accordance with Pennsylvania law which provides that the right and power to punish such actions is inherent in the court in which the contemptuous action occurred. The statutory basis is found in the Act of June 16, 1836, P. L. 784, § 23, 17 P. S. § 2041:

> The power of the several courts of this Commonwealth to issue attachments and to inflict summary punish-

> ments for contempts of court shall be restricted to the following cases, to-wit:
>
> * * *
>
> iii to the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.

See *Knaus v. Knaus,* 387 Pa. 370, 376, 127 A. 2d 669 (1956); *Levine Contempt Case,* 372 Pa. 612, 618, 95 A. 2d 222 (1953); *cert. denied,* 346 U. S. 858; *Passmore Williamson's Case,* 26 Pa. 9, 18 (1855).

The categories of contempt and the definition of direct criminal contempt under Pennsylvania law were set forth in *Knaus v. Knaus, supra.*

> Contempts broadly fall into two categories, civil and criminal. Criminal contempts are further subdivided into direct and indirect contempts.
>
> A direct criminal contempt consists of misconduct of a person in the presence of the court, or so near thereto as to interfere with its immediate business, and punishment for such contempts may be inflicted summarily: Act of June 16, 1836, P. L. 784, § 23, 24, 17 P. S. § 2041, 2042: Levine Contempt Case, 372 Pa. 612, 95 A. 2d 222; Snyder's Case, 301 Pa. 276, 152 A. 33.
>
> The dominant purpose of a contempt proceeding determines whether it is civil or criminal. If the dominant purpose is to vindicate the dignity and authority of the court and to protect the interest of the general public, it is a proceeding for criminal contempt (387 Pa. at 375-376).

See also: *Commonwealth ex rel. Beghian v. Beghian,* 408 Pa. 414, 184 A. 2d 270 (1962); *Commonwealth v. Harris,* 409 Pa. 163, 185 A. 2d 586 (1963); *Philadelphia Marine Trade Ass'n. v. International Longshoreman's Ass'n.,* 392 Pa. 500, 509, 140 A. 2d 814 (1958).

If ever action constituted "misbehavior of any person in the presence of the court, thereby obstructing the administration of justice", petitioner's does. If ever "the dominant purpose" of a proceeding was "to vindicate the dignity and authority of the court", the purpose of this case is such. It is submitted that action as contemptuous as petitioner's has never been reported in the Commonwealth of Pa. Petitioner led his co-defendants in a deliberate campaign to force the trial judge to commit reversible error and to prevent the conduct of his trial. His record is replete with evidence of their contemptuous conduct. Examples may be found on almost any of the three thousand odd pages of the trial transcript. Many of the contemptuous acts were ignored by the trial judge in imposing the sentences for criminal contempt.

A review of the pages of the trial transcript reveals that the petitioner accused the trial judge of denying him a fair trial and called him "a hatchet man for the state" and a "dirty son-of-a-bitch" (TT. 42).[2] He later implied that the court did not know how to rule on the defendant's motions and was acting as a "Gilbert and Sullivan the way you sustain the District Attorney . . ." (TT. 1296).

Petitioner stated to the court that he would not be "railroaded into any life sentence by any dirty tyranical old dog like yourself" (TT. 1627). He also asked the trial judge "to keep your mouth shut . . ." (TT. 1793).

Petitioner accused the court of working for the prison authorities; told him to "go to hell"; that he did not "give a good God-damn" what the court suggested; and called the court a "bum" and a "stumbling dog" (TT. 1839).

[2] Numerals in parentheses preceded by the letters "TT" refer to pages of the trial transcript.

Petitioner stated that the rulings of the court were "unimportant" and that he would only be silent if gagged (TT. 2280).

Petitioner again accused the court of acting as a "Gilbert and Sullivan" in sustaining the prosecutor's objections (TT. 2314). He accused the court of conducting a "Spanish Inquisition" (TT. 2403). He again accused the court of railroading him and told the trial judge that he was in need of psychiatric treatment and was "some kind of a nut" and was working for Warden Maroney (TT. 2408-2410).

Petitioner stated that the trial was the "craziest" he had ever seen (TT. 2503-2504). He further refused to abide by the rulings of the court in the calling of witnesses (TT. 2591-2592.) Petitioner accused the court of denying him the right to examine certain witnesses because the trial judge was afraid of the facts that might be revealed. He again used profanity in replying to the court and called the trial judge a "creep" (TT. 2610-2612).

Petitioner accused the court of arguing with him and stated to the court that he refused to argue with "fools" (TT. 2682-2683).

Petitioner again accused the court of denying him a fair trial and refused to abide by the rulings of the court to the point that the court was forced to order him removed from the courtroom (TT. 3018-3021).

Petitioner stated in open court his intention of disrupting the court's charge to the jury, which he did and continued to do even though gagged. The court was finally forced to have him placed in a strait jacket and removed to an adjoining courtroom into which the charge to the jury was

broadcast through a public address system (TT. 3089-3094c).

While the statement that "It is most difficult to peruse a 'cold record' and feel the tension and spirit of a trial" has been termed a "trite observation" (*Commonwealth v. Lufton*, 389 Pa. 273, 282, 133 A. 2d 203 (1957)), it is respectfully submitted that the record cannot show the vicious and insulting manner in which petitioner delivered the litany of abuse, profanity and disrespect recited above. In any event, the record does clearly show that petitioner's speech and actions, uttered and committed in open court, constituted misbehavior and disrupted the orderly administration of justice. His behavior is all the more contemptuous when it is remembered that he was representing himself and acting as his own attorney at this trial, although not a member of the Bar.

The Pennsylvania Supreme Court characterized this behavior as "a course of conduct . . . almost beyond belief and of an obviously and patently planned and determined attempt . . . to interfere with the administration of justice and to make a farce and mockery of his trial." The court also described petitioner's actions as "outrageous conduct during the course of the trial". The court concluded that "the record further demonstrates beyond any question that [petitioner's] behavior was calculated and planned with the aim of disrupting the orderly procedure of the trial and the administration of justice."

The Pennsylvania Supreme Court held that the contempt charges upon which petitioner was sentenced constituted "*direct* criminal contempt which took place in the presence of the court and the jury" and upheld the trial court's right to sentence petitioner summarily.

Persons charged with direct criminal contempt are not entitled to a jury trial in the Commonwealth of Pennsylvania. Act of June 23, 1931, P. L. 925, § 1, 17 P. S. § 2047 which is set forth in full, as follows:

> In all cases where a person shall be charged with indirect criminal contempt for violation of a restraining order or injunction issued by a court or judge or judges thereof, the accused shall enjoy—
>
> (a) The rights as to admission to bail that are accorded to persons accused of crime;
>
> (b) The right to be notified of the accusation and a reasonable time to make a defense, provided the alleged contempt is not committed in the immediate view or presence of the court;
>
> (c) Upon demand, the right to a speedy and public trial by an impartial jury of the judicial district wherein the contempt shall have been committed, provided that this requirement shall not be construed to apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice, or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court; and
>
> (d) The right to file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge, and if the attack occurred otherwise than in open court. Upon the filing of any such demand, the judge shall thereupon proceed no further but another judge shall be designated by the presiding judge of said court. The demand shall be filed prior to the hearing in the contempt proceeding.

Imprisonment is the proper punishment for direct criminal contempt. Act of June 16, 1836, P. L. 784, § 23, 24, 17 P. S. § 2041, 2042. The sentences imposed by the trial judge in the instant case are in accordance with Pennsylvania

law. The Pennsylvania Supreme Court found that compliance with these requirements protected the petitioner's due process rights.

Neither was Petitioner's Sixth Amendment right to trial by jury as incorporated into the Fourteenth Amendment violated.

Petitioner was summarily convicted of direct criminal contempt on December 12, 1966. Your Honorable Court in *Duncan v. Louisiana*, 391 U. S. 145 (1968), *Bloom v. Illinois*, 391 U. S. 194 (1968) and *Dyke v. Taylor Implement Manufacturing Co., Inc.*, 391 U. S. 216 (1968), all decided May 20, 1968, has announced principles which, if applicable to the instant case, would entitle the appellant to a jury trial.

However, it has also decided that the constitutional interpretations announced in *Duncan v. Louisiana, supra*, and *Bloom v. Illinois, supra*, are not to be applied to trials begun prior to May 20, 1968.[3] *DeStefano v. Woods*, 392 U. S. 631 (1968); *Carcerano v. Glidden*, 392 U. S. 631 (1968). In *DeStefano v. Woods, supra*, the court announced:

> The considerations are somewhat more evenly balanced with regard to the rule announced in *Bloom v. State of Illinois*. One ground for the *Bloom* result was the belief that contempt trials, which often occur before the very judge who was the object of the allegedly contemptuous behavior, would be more fairly tried if a jury determined guilt. Unlike the judge, the jurymen will not have witnessed or suffered the alleged contempt, nor suggested prosecution for it. However, the tradition on non-jury trials for contempts was more firmly established than the view that States could dispense with jury trial in normal criminal prosecutions, and reliance on the cases overturned by *Bloom*

[3] In view of the holding that *Duncan* and *Bloom* are not to be retroactively applied, the Commonwealth does not deem it necessary to discuss petitioner's failure to request a jury trial.

> *v. State of Illinois* was therefore more justified. Also, the adverse effects on the administration of justice of invalidating all serious contempt convictions would likely be substantial. Thus, with regard to the *Bloom* decision, we also feel that retroactive application is not warranted.

Obviously, these cases do not apply to a conviction on December 12, 1966.

Petitioner however, would have your Honorable Court extend to him ancillary rights under the *Bloom* decision while conceding that the jury trial holding is inapplicable to him. The Commonwealth maintains that this interpretation of *Bloom* is unwarranted under the *Bloom* decision and urges your Honorable Court to reject this contention.

The Commonwealth cannot take exception to the Petitioner's discussion relative to your Honorable Court's rejection of the theory of vindicating the authority of the court to justify summary trial of serious contempt charges because of the serious punishment involved here. Were it not for the actual sentence here of one to two years for each contempt, or an aggregate of eleven to twenty-two years, the Commonwealth would argue that the *Bloom* decision was not concerned with direct criminal contempt as is present here. The statement of Mr. Justice White that

> Although Rule 42 (a) is based in part on the premise that it is not necessary specially to present the facts of a contempt which occurred in the very presence of the Judge, it also rests on the need to maintain order and a deliberative atmosphere in the courtroom. *The power of a judge to quell disturbance cannot attend upon the impaneling of a jury.* There is, therefore, a strong temptation to make exception to the rule we establish today for disorders in the courtroom. We are convinced, however, that no such special rule is needed. It is old law that the guarantees of jury trial

> found in Article III and the Sixth Amendment *do not apply to petty offenses* (391 U. S. at 209-210).

lends itself to the reasonable deduction affirming the power of the court to punish for direct criminal contempt and to impose punishment summarily.

Illinois v. Allen, 397 U. S. 337 (1970) clearly affirms this:

> We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

However, the Commonwealth concedes that the import of those cases in this regard is the power to punish for short sentences and do not necessarily contemplate punishment of the nature meted out here.

The recent decision of your Honorable Court in *Baldwin v. New York*, ___ U. S. ___ (decided June 22, 1970) does not mandate a different result here. In speaking of the right to a jury trial, Mr. Justice White stated:

> . . . In deciding whether an offense is "petty," we have sought objective criteria reflecting the seriousness with which society regards the offense, *District of Columbia v. Clawans*, 300 U. S. 617, 628 (1937), and we have found the most relevant such criteria in the severity of the maximum authorized penalty. *Frank v. United States*, 395 U. S. 147, 148 (1969); *Duncan v. Louisiana, supra*, at 159-161; *District of Columbia v. Clawans, supra*, at 628. Applying these guidelines, we have held that a possible six-month penalty is short enough to permit classification of the offense as "petty", *Dyke v. Taylor Implement Co.*, 391 U. S. 216, 220 (1968); *Cheff v. Schnackenberg*, 384 U. S. 373 (1966), but that a two-year maximum is sufficiently "serious" to require an opportunity for jury trial, *Duncan v. Louisiana, supra*. The question in this case is whether

> the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is. More specifically, we have concluded that no offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment for more than six months is authorized.

Consequently, since the sentence here exceeded a one year duration for each contempt, the petitioner would have been entitled to a jury trial since the direct criminal contempt here cannot be considered a "petty" offense. Nonetheless, citing the language of *DeStefano v. Wood*, 392 U. S. at 634, the Commonwealth respectfully urges that *Baldwin* be held to prospective application only:

> The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. Second, states undoubtedly relied in good faith upon the past opinions of this court to the effect that the Sixth Amendment right to jury trial was not applicable to the States. . . .Third, the effect of holding of general retroactivity of law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now accepting the Sixth Amendment guarantee.

Were *Bloom* and *Baldwin* retroactive, the Commonwealth would concede that petitioner was entitled to a jury trial.

The Commonwealth does not concede, however, that petitioner is entitled to a reversal on the grounds that *Bloom* retroactively holds that a contemnor is entitled to a non-jury trial proceeding.

Prior to your Honorable Court's pronouncements in *Bloom* and *Baldwin*, the law of direct criminal contempt

of Pennsylvania met existing due process requirements. The Pennsylvania courts adopted the pronouncement of *In Re Oliver*, 333 U. S. 257 (1948).

In *Weiss v. Jacobs*, 405 Pa. 390, 394-395, 175 A. 2d 849 (1961), the Pa. Supreme Court said:

> In *In Re Oliver*, 333 U. S. 257, at 275-276, the United States Supreme Court stated: "due process of law, . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open Court, in the presence of the Judge, which disturbs the Court's business, where all of the essential elements of the misconduct are under the eye of the Court . . . and where immediate punishment is essential to prevent 'demoralization of the Court's authority' before the public. If some essential elements of the offense are not personally observed by the Judge, . . . due process requires, . . . that the accused be accorded notice and a fair hearing . . ."

Consequently, petitioner's rights to procedural due process were clearly protected since the trial court complied with the then-existing state of Pennsylvania law.

The loss of the other rights allegedly denied the petitioner would have been prejudicial only in the context of a jury trial.

17 P. S. 2047 (b) makes it clear that an alleged contemnor is not entitled "to be notified of the accusation and a reasonable time to make a defense" if the alleged contempt occurred in open court. As has previously been demonstrated, the recent decisions of your Honorable Court granting those charged with "serious" contempts

the right to a jury trial are inapplicable to the instant case. 17 P. S. 2047(c) does not give one who has committed contempt in the presence of the court—as the petitioner most certainly did—the right to a jury trial. In any event, petitioner never requested a jury trial, as the statute undoubtedly requires. Nor did the provisions of 17 P. S. 2047(d) prevent the trial judge from himself imposing the sentences. In short, under the law of this Commonwealth, a person committing direct criminal contempt may be summarily convicted so long as the provisions of the statute are met. This was done here. None of petitioner's rights were infringed.[4]

No authority for petitioner's contention that he should have had notice is to be found in Pennsylvania cases or statutes. It is noted that not even the statute governing the procedure to be followed in *indirect* criminal cases, Act of June 23, 1931, P. L. 925, § 1, 17 P. S. 2047, requires that the trial judge advise a defendant of the nature and elements of the crime of criminal contempt. Nor does it seem that the giving of such a warning is required by due process.

Moreover, it is reasonable for your Honorable Court to infer that petitioner's common sense and previous experience with criminal contempt would give him some idea that the trial court might regard his actions as contemptuous. The Commonwealth believes it relevant to note that the appellant was convicted of direct criminal contempt

[4] The Commonwealth wishes to note that the trial judge, exercising almost inhuman patience and restraint, did not convict petitioner of contempt immediately following each of the contemptuous acts. Undoubtedly, this was because the trial judge did not want any action he might take during the course of the trial to prejudice the petitioner's rights to a fair trial and therefore delayed convicting the petitioner of contempt until after the jury had returned its verdict. It is ironic that the trial judge's attempt to protect the petitioner's rights has only prompted a complaint that petitioner's rights were violated.

of court in a trial in May of 1966 in Philadelphia. The Pennsylvania Supreme Court specifically found that Mayberry knew that his actions were contumacious.

> . . .The language and actions of Mayberry, even though he is a layman, were of such a nature that he had every reason to know that his conduct was in contempt of court; moreover, it is evident from this record that Mayberry's conduct was part of a scheme and plan to disrupt and render chaotic the conduct of his trial. We see no reason, under the circumstances, why Mayberry on each and every occasion should have been warned of that of which he must have been fully aware. He knew that his conduct was outrageous and he deliberately planned such a course of conduct (434 Pa. at 486).

In any event, on at least two occasions, the trial judge indicated that he regarded the petitioner's speech and action as contemptuous.

> The Court: Is there anything else you want to put on the record?
>
> Mr. Mayberry: That any personal feelings you may display towards the defendants have nothing to do with the facts of the case or the guilt or innocence of the defendants.
>
> The Court: That is Correct, Mr. Mayberry, and at the proper time I will state to the jury—at this time I will state to the jury I have no feelings about this case. I do have feelings that the contempt that the defendants have shown in this case towards the Court, but at the proper time I will instruct the jury to disregard that and to try this case solely and simply upon the evidence that has been presented in this case.
>
> Mr. Mayberry: Now, your Honor, am I to understand that you are holding the defendants in contempt?
>
> The Court: I didn't say that.
>
> Mr. Mayberry: Do I understand you to say that the defendant Mayberry has exhibited contempt for the process of law and justice in this Court?
>
> The Court: We will take care of that matter at a later stage. Proceed with your cross examination.

* * *

(Thereupon Mr. Langnes was escorted back into the courtroom.)

Mr. Langnes: I still refuse to shut up.

Mr. Mayberry: Now, what I was saying—

The Court: You keep quiet, Mr. Langnes. Proceed with your questioning.

Mr. Langnes: What I was saying—

The Court: Keep quiet.

Mr. Langnes: —about the newspapers and—

The Court: Keep quiet. We will hear you at a later time, at the lunch hour.

Mr. Langnes: I am saying it now while the people are here and know what's coming off.

The Court: Do we have a gag here?

Mr. Langnes: You'll have to gag me.

The Court: Do we have a gag here?

(Off record discussion.)

Mr. Mayberry: I have to ask for a severance.

The Court: I have heard that before. It is denied again. Let's go on.

(Exception noted.)

Mr. Mayberry: This is the craziest trial I have ever seen.

Mr. Mayberry: Well, my next witness is George Deputy, who I call next.

The Court: Refused.

Mr. Mayberry: And after that I ask for Edward C. Robinson, a prisoner at the penitentiary be called as a witness.

The Court: Mr. Mayberry, of all the innumerable contempts you have committed, you are committing a contempt of court. I have told you that you have certain witnesses that have been subpoenaed that may be called.

Mr. Mayberry: All I am asking the Court is to rule.

The Court: There will be no more name calling.

Mr. Mayberry: Is it the same ruling?

The Court: No, sir. I am not going to keep ruling on that. I want you to understand that, Mr. Mayberry. Now call the witnesses whom the Court indicated that are available to you.

Mr. Mayberry: Before I get to that I wish to have a ruling, and I don't care if it is contempt or whatever you want to call it, but I want a ruling for the record

that I am being denied these witnesses that I asked for months before this trial ever began.

The Court: Once again let the record show that the defendant Mayberry together with all of the other defendants have submitted a list of witnesses with a show of proof. The Court has passed upon all of those witnesses and the reason stated in the show of proof as a result of which certain witnesses were subpoenaed to appear in this Court. The Court therefore is limiting the defendants to the production of those witnesses who have been subpoenaed to appear in this case.

The Court: You will not be permitted to ask this witness any questions relating to your cell block and the job that you had. You will not be permitted to ask this witness relating to the selling job that you had to prove you had nothing to do with this escape.

These are matters that you will not be permitted to make inquiries into.

Mr. Mayberry: Yeah? Why? What are you scared that certain fact might be brought out?

The Court: I have made a ruling, Mr. Mayberry, limiting—

Mr. Mayberry: I know what the hell you done, you creep. What do you do? Eat at the same club as him every night? Scared that certain facts might be brought out?

The Court: These are the limits in which you will not interrogate this witness, and I will tell you ahead now that we will stop you, if you do (TT 2503-2611).

It is submitted that these statements of the trial judge sufficed to appraise the Petitioner that his speech and actions were regarded as contemptuous.

B. Petitioner was not entitled to speak in mitigation of sentence by himself or through specially-appointed counsel.

Petitioner urges that despite the repeated and heavy abuse to which he subjected the trial court, the trial court should have permitted him to speak in mitigation of the sentence to be pronounced.

The Commonwealth contends that petitioner waived any right to speak in mitigation of sentence, either by himself or through counsel.

In a summary conviction the defendant necessarily looses certain customary procedural safeguards, among them the right to representation by counsel. *Cf., Sacher v. United States,* 343 U. S. 1, 72 S. Ct. 451 (1952). *In Re Oliver, supra.* In *Holt v. Commonwealth of Virginia,* 381 U. S. 131, 85 S. Ct. 1375 (1965) the Supreme Court indicated that the defendant in the type of contempt there under review did not lose his Sixth Amendment right to counsel. 381 U. S. at 136, 85 S. Ct. at 1378. In support of this statement the court cited *In Re Oliver, supra,* and *Gideon v. Wainwright,* 372 U. S. 335, 83 S. Ct. 792 (1963). However, it is to be noted that the type of contempt under review in *Holt* is far different from that presently before your Honorable Court. The court noted in *Holt:* "It is not charged that petitioners here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any officer of the court from carrying on his court duties." 381 U. S. or 136, 85 S. Ct. at 1377-1378.

The Commonwealth respectfully submits that one whose actions are so contemptuous as to necessitate the court to wield its summary powers to protect itself does not have the right to the assistance of counsel. The loss of right to the assistance of counsel is a necessary, although harsh, corollary of a court's exercise of its summary powers. Therefore, those contempts which may be summarily punished are narrowly defined and generally due process requires that the normal procedural safeguards are not lost to one charged with contempt. See 17 P. S. 2047; *In Re Oliver, supra.* Petitioner's conduct, falling within that

category of contempts which may be summarily punished, leads to the loss of the right to the assistance of counsel.

Moreover, petitioner consistently and repeatedly stated that he wanted to represent himself and would not accept court-appointed counsel. Nonethless, an Assistant Public Defender appeared with him at all times.

In addition, petitioner lost any right to speak on his own behalf by the very nature of the constant verbal abuse directed to the court.[5] He was not entitled to speak in mitigation since the contempt was committed in the presence of the sentencing judge. Petitioner is unable to cite any specific matter which he could or would have brought to the court's attention at sentencing and the Commonwealth maintains that nothing could possibly have justified, excused or mitigated the constant barrage of abuse in which petitioner engaged.

At sentencing petitioner did not give the slightest indicia of remorse. If petitioner wished to express some reason for his actions, he could certainly have petitioned the court to modify the sentence. Petitioner did not do so but chose to exercise his right of direct appeal to the Pennsylvania Supreme Court.

Since the lower court sentenced petitioner in accordance with a law in effect before *Bloom,* petitioner's only due process challenge must be whether the sentencing court followed the procedure of the statute.

The Pennsylvania Supreme Court held that the sentencing court had fully protected the rights to which the petitioner was entitled.

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[5] It is interesting to note that petitioner was convicted of direct criminal contempt of court in a trial in May of 1966 in Philadelphia. See Nos. 395, 396, 397, 398, 399 January Term, 1966. At the sentencing on this contempt, petitioner utilized his right to speak in mitigation to heap additional abuse upon the sentencing court.

II. Due process does not require the trial judge to disqualify himself where the contempt was committed in his presence nor do the peculiar facts herein warrant such action.

Petitioner apparently maintains that the sentencing court should have surrendered its plenary power to sentence summarily for direct criminal contempt *sua sponte*.

It should be noted that petitioner did not request the disqualification but chooses now to raise this on appeal. It is no answer to say that petitioner was denied the right to challenge the jurisdiction of the court of grounds of alleged bias since petitioner did have previous experience with contempt charges and could have prepared and filed a *written* petition. In addition, he could have requested his court-appointed trial counsel to do so in his behalf.

The Commonwealth does not challenge the line of cases beginning with *Cooke v. United States*, 267 U. S. 517 (1925) insofar as they call for the disqualification of a trial judge who has been subjected to severe personal criticism.

However, these cases are not applicable to the present case for several reasons.

Initially, it must be remembered that the petitioner was sentenced under the court's inherent power to punish for contempts committed within its presence. This power is neither abolished nor diminished by *Illinois v. Allen*, *supra*. In fact, *Allen* reinforces the use of the criminal contempt power as a legitimate and constitutional method of controlling an unruly defendant.

Secondly, the same considerations that led the *Sacher* court to withhold sentencing until the conclusion of the trial are applicable here. Petitioner was acting as his own

counsel and the court obviously waited until the conclusion of the trial in order to prevent the contempt punishment from interfering with petitioner's representation or to have any effect upon the jury's impartial resolution of the felony charges. Certainly the judge could have done at the conclusion of the trial what he could have done during the course of trial but waited to protect petitioner.

Finally, the thrust of the verbal abuse by the petitioner was directed toward preventing the trial. Consequently, as is pointed out in Section III below, it is irrelevant that many of the epithets petitioner utilized were of a personal nature. It is beyond question that the trial judge realized this and continued with the trial.

Therefore, since the sentencing judge was under no constitutional or statutory duty to disqualify himself and petitioner never requested him to do so, this challenge should be denied.

III. The Pennsylvania Criminal Contempt Statute, as applied to petitioner, is not unconstitutionally vague.

Petitioner contends that the Act of June 16, 1836, P. L. 784 § 23, 17 P. S. § 2041 is unconstitutional as applied to the instant case because it fails to establish a standard of permissible behavior and its terms are unclear and indefinite. The Commonwealth, of course, agrees that this statute is applicable to the instant case. However, the Commonwealth disagrees with the conclusions petitioner reaches concerning the statute.

The Commonwealth respectfully submits that the behavior prohibited by the statute is clear enough so that anyone appearing in court would know which acts or words are permissible and which not.

Petitioner's argument here is that nine of the eleven counts of contempt consisted solely of personal epithets directed at the trial judge. Consequently, he alleges that these nine "verbal epithets and allegations of misconduct" cannot be fairly described as obstructing the administration of justice.

The Commonwealth maintains that not only is this allegation a misstatement of fact but is a ludicrous distortion of the chaotic atmosphere which petitioner created.

As the Pennsylvania Supreme Court so correctly stated:

> The instant case presents an example of a person charged with a criminal offense who deliberately, consciously and intentionally enters upon his trial proposing to so obstruct, by his language and his actions, the orderly trial process in order to thwart the administration of justice. Such conduct cannot and should not be tolerated. To hold otherwise is to make a mockery of criminal trials and to render our courts subject to infamy and abuse (434 Pa. at 486).

To describe the innumerable delays, courtroom disturbances and general disorder which petitioner caused would require substantial space. Unfortunately, the record does not specifically reflect the length time lapses which occurred nor the disruptions reflected in the courtroom. Nonetheless, these did occur and petitioner cannot take advantage of a cold record to deny this. There can be no doubt that petitioner's "misbehavior" had the effect of "obstructing the administration of justice." Were it not for the tremendous patience and continued perseverance of the trial judge, surely petitioner would have achieved his goal of preventing the trial.

IV. Petitioner's sentence of one-to-two years for each contempt does not constitute cruel and unusual punishment.

Petitioner's contention that he has been subjected to "cruel and unusual punishment" in violation of the Eighth Amendment because of the length of the sentences imposed is without merit.

The Commonwealth wishes to point out that petitioner erroneously lumps together the eleven one-to-two year sentences imposed and treats them as a single sentence. The lower court meticulously segregated the various contemptuous acts and imposed separate sentences for each. The eleven separate sentences may not be treated as a single sentence.

The Commonwealth earnestly contends that although petitioner may have displayed a "continuous contemptuous attitude" toward the court, his speech and actions may be separated into distinct contempuous acts. Petitioner's words and actions were not so close in time or manner that they merged into a single act of contempt. Petitioner committed eleven separate acts of direct criminal contempt. Even if these sentences are consolidated, twenty-two years is the maximum sentence. As previously note, imprisonment is the proper punishment for direct criminal contempt and each contempt may be separately punished. Your Honorable Court upheld a contempt sentence of three years for one count in *Green v. United States,* 365 U. S. 165 (1958).

There is no doubt as to the applicability of the Eighth Amendment to the states. However, considering that imprisonment has been the historic punishment for direct criminal contempts, the Commonwealth respectfully submits that it is neither cruel nor unusual punishment.

Conclusion

The Commonwealth's position is that the petitioner's actions and words were contemptuous and that he was properly summarily convicted of direct criminal contempt of court. The procedural rights with which petitioner now seeks to surround himself do not attach to a summary conviction. The warnings he contends should have been given by the trial judge are not required by Pennsylvania law or by the Due Process Clause of the Fourteenth Amendment. The sentences imposed were proper.

The Pennsylvania statute defining what contemptuous actions may be summarily punished does provide a clear standard of prohibited behavior and is not unconstitutionally vague.

The order of the lower court must be affirmed.

Respectfully submitted,

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